

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ARTHUR USHERSON,

Plaintiff,

v.

BANDSHELL ARTIST MANAGEMENT

Defendant.

Docket No. 1:19-cv-6368

**ANSWER AND AFFIRMATIVE
DEFENSES OF BANDSHELL ARTIST
MANAGEMENT**

**DEFENDANT’S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF’S
COMPLAINT**

Defendant Bandshell Artist Management (“Bandshell”) by and through its attorneys, for its Answer and Affirmative Defenses to the Complaint of Plaintiff Arthur Usherson states as follows:

NATURE OF THE ACTION

1. Bandshell is without sufficient information to admit or deny whether Plaintiff owns and registered the photograph at issue and therefore denies the same. Bandshell denies any unauthorized reproduction or public display of the photograph. Bandshell denies Plaintiff is entitled to any monetary relief. Bandshell denies any remaining allegations in this paragraph.

JURISDICTION AND VENUE

- 2. Admitted.
- 3. Admitted.
- 4. Admitted.

PARTIES

5. Bandshell is without sufficient information to admit or deny the allegations in this paragraph and therefore denies the same.

6. Denied as Bandshell's place of business is at 204 West 84th St. Ste 204, New York, New York 10024. Further denied as Bandshell was only one of several administrators of the Website in question.

STATEMENT OF FACTS

A. Background and Plaintiff's Ownership of the Photograph

7. Bandshell is without sufficient information to admit or deny the allegations in this paragraph and therefore denies the same.

8. Bandshell is without sufficient information to admit or deny the allegations in this paragraph and therefore denies the same.

9. Bandshell is without sufficient information to admit or deny the allegations in this paragraph and therefore denies the same.

B. Defendant's Allegedly Infringing Activity

10. Bandshell admits the photograph ran on a page administrated in part by Bandshell and denies any remaining allegations in this paragraph.

11. Denied.

CLAIM FOR RELIEF

12. Bandshell incorporates by reference each and every response contained in Paragraphs 1-11 above.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

PRAYER FOR RELIEF

Bandshell denies all factual assertions contained in Plaintiff's prayer for relief and further denies that Plaintiff is entitled to any relief in this action.

GENERAL DENIAL

All allegations in the Complaint not specifically admitted are denied.

AFFIRMATIVE DEFENSES

By way of further answer, and without conceding that it bears the burden of proof as to any of these defenses, Bandshell asserts the following defenses to the claims set forth in Plaintiff's Complaint:

FIRST AFFIRMATIVE DEFENSE
(FAILURE TO STATE A CLAIM)

Plaintiff fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE
(NO COPYRIGHT INFRINGEMENT)

Bandshell has not infringed and does not infringe any valid and enforceable copyright of Plaintiff.

THIRD AFFIRMATIVE DEFENSE
(FAIR USE DOCTRINE)

Plaintiff's claims are barred, in whole or in part, by the Fair Use Doctrine.

FOURTH AFFIRMATIVE DEFENSE
(ACQUIESCENCE, UNCLEAN HANDS, WAIVER, AND ESTOPPEL)

The relief sought by Plaintiff is barred, in whole or in part, by the equitable doctrines of acquiescence, unclean hands, waiver, and estoppel.

FIFTH AFFIRMATIVE DEFENSE
(IMPLIED LICENSE)

Plaintiff's claims are barred, in whole or in part, under the doctrine of implied license.

SIXTH AFFIRMATIVE DEFENSE
(NO DAMAGES)

Plaintiff's claims and damages claims are barred because Plaintiff has suffered no provable damages in this case. Nor can Plaintiff show any provable nexus between any damages and the alleged infringement.

SEVENTH AFFIRMATIVE DEFENSE
(NO INJUNCTIVE RELIEF)

To the extent Plaintiff seeks injunctive relief for any alleged infringement, the relief is unavailable because any alleged injury to Plaintiff is not immediate or irreparable, the balance of hardships and public interest weighs against the grant of an injunction, and Plaintiff has an adequate remedy at law.

EIGHTH AFFIRMATIVE DEFENSE
(RESERVATION OF REMAINING DEFENSES)

Bandshell reserves all defenses, at law or in equity, which may now exist or in the future may be available based on discovery.

WHEREFORE, Bandshell requests that this Court enter judgment in Defendant's favor, dismiss Plaintiff's Complaint with prejudice, award Defendant all costs and fees incurred herein, including attorneys' fees, and order whatever further relief this Court deems just and appropriate.

Respectfully submitted on September 25, 2019.

BANDSHELL ARTIST MANAGEMENT

/s/ Brad R. Newberg

Brad R. Newberg (#BN1203)

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*Attorney for Defendant Bandshell Artist
Management*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Answer and Affirmative Defenses to Plaintiff's Complaint with the Clerk of the Court using the CM/ECF system on this 25th day of September, 2019, which constitutes service on Plaintiff, a registered user of the CM/ECF system pursuant to Fed. R. Civ. P. 5(b)(2)(E).

Dated: September 25, 2019

/s/ Brad R. Newberg
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